Supreme Court, U.S.
FILED

1

No. 05 1040 FEB 14 2006

OFFICE OF THE CLERK

In The

Supreme Court of the United States

BRENNAN'S INC.,

Petitioner,

v.

RICHARD J. BRENNAN, JR., DICKIE BRENNAN & COMPANY, INC., COUSINS RESTAURANTS, INC., AND SEVEN SIXTEEN IBERVILLE, L.L.C.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

EDWARD F. KOHNKE IV
JOSEPH N. MOLE
MICHAEL H. PINKERTON
Counsel of Record
FRILOT, PARTRIDGE, KOHNKE & CLEMENTS, L.C.
3600 Energy Centre
1100 Poydras Street
New Orleans, LA 70163-3600
Telephone: (504) 599-8000

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

(1) Is a federal action between parties deemed to be the "same cause of action" as an earlier federal action between the parties, and therefore barred by *res judicata*, when (a) the key facts underlying the second action are part of the same transaction or series of transactions that were implicated in the first suit? or (b) when the key evidence to be introduced in the second action was previously considered in the earlier federal action?

(2) If the proper test for application of federal *res judicata* principles is the "transactional test," is a party that brings an action against another to enforce certain of its contractual rights forever barred from bringing another action to enforce other rights contained in the contract, even if the cause of action to enforce those rights had not yet arisen during the course of the earlier federal litigation?

LIST OF PARTIES TO THE PROCEEDING

The parties to this proceeding are Brennan's Inc., the Plaintiff/Petitioner, and Richard J. Brennan Jr., Dickie Brennan & Company, Inc., Cousins Restaurants, Inc., and Seven Sixteen Iberville, L.L.C., the Defendants/Respondents. There are no parent corporations of Brennan's Inc., as it is owned by three individual shareholders. Likewise, Dickie Brennan & Company, Inc., Cousins Restaurants, Inc., and Seven Sixteen Iberville, L.L.C. are not believed to be owned by any parent corporations.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The opinion of the court of appeals is reported at 150 Fed. Appx. 365, 2005 WL 2662470 (5th Cir. 2005). The order of the court of appeals denying rehearing is unreported. The opinion of the district court is reported at 377 F. Supp. 2d 579 (E.D. La. 2005).

JURISDICTION

The court of appeals' judgment was entered on October 19, 2005. A timely petition for rehearing was denied on November 17, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1338 provides, in pertinent part:

> (a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

Louisiana Civil Code article 2024 provides:

> A contract of unspecified duration may be terminated at the will of either party by giving notice, reasonable in time and form, to the other party.

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides, in pertinent part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted.

STATEMENT OF THE CASE

This case involves a dispute between prominent restaurateurs in New Orleans, Louisiana. Since 1946, the Plaintiff/Petitioner, Brennan's Inc., has operated Brennan's Restaurant, a French and Creole restaurant located in the heart of the French Quarter. It has used the federally protected service mark "BRENNAN'S" in connection with the restaurant since at least 1951.

In 1998, Brennan's Inc. learned that the Defendants/ Respondents, Dickie Brennan & Company, Inc., Cousins Restaurants, Inc., and Seven Sixteen Iberville, L.L.C. (collectively referred to as "Dickie Brennan") intended to open "Dickie Brennan's Steakhouse" only three blocks away from Brennan's Restaurant in the French Quarter. The parties temporarily avoided litigation after Dickie Brennan agreed to eliminate confusion existing in the New Orleans restaurant market from his use of "BRENNAN'S." In exchange, Brennan's Inc. agreed to grant Dickie Brennan the right to use "BRENNAN'S" under specified terms and conditions. The agreement, referred to as the "1998

Agreement," contains no term of duration and no method for termination by the parties.

In 2000, Brennan's Inc. filed suit (the "2000 Lawsuit") against Dickie Brennan to nullify the 1998 Agreement on the basis it was procured by fraud. Brennan's Inc. also sought damages in the 2000 Lawsuit for Dickie Brennan's breach of the 1998 Agreement for failing to take effective measures to eliminate confusion between the restaurants. Brennan's Inc.'s other damage claims were for infringement of the service mark, unfair competition, false representation, and false designation of origin and dilution under federal and Louisiana trademark law. Brennan's Inc. did not allege, nor could it have alleged, the 1998 Agreement had terminated as a matter of law by Brennan's Inc.'s giving a notice of termination to Dickie Brennan.

At trial, the jury found no evidence of fraud. It did find that Dickie Brennan had breached the 1998 Agreement, but it concluded the breach was not serious enough to justify the contract's dissolution. Instead, the jury determined the proper remedy was specific performance of the ongoing 1998 Agreement. The district court entered a judgment accordingly. *See* App. 3-6.

Subsequently, on August 5, 2004, Brennan's Inc. sent Dickie Brennan a letter notifying them of its decision to terminate the 1998 Agreement, and requested they cease using the "BRENNAN'S" mark. The basis for the termination letter was the fact the contract has an indefinite term of duration. Pursuant to Article 2024 of the Louisiana Civil Code, either party to a contract of unspecified duration may terminate the contract by giving notice, reasonable in time and form, to the other party. *See* La. C.C. art.

2024. Upon their receipt of the letter, Dickie Brennan ignored it and continued to use the service mark.

Brennan's Inc. then filed this lawsuit (the "2004 Lawsuit"), asking the district court to declare the 1998 Agreement terminated by the August 5, 2004, letter and Article 2024. The district court had original jurisdiction over the matter pursuant to 15 U.S.C. §§ 1116 and 1121 and 28 U.S.C. §§ 1331 and 1338, as it involved a claim to enjoin the infringement of a federally protected trademark and sought a declaration of the parties' rights with respect to that trademark.

In response to the 2004 Lawsuit, Dickie Brennan moved to dismiss the case on the basis of *res judicata.* They asserted that although the 1998 Agreement survived the earlier litigation and remains in force and effect, Brennan's Inc. had merely switched its theories in the subsequent suit. They essentially argued that due to Brennan's Inc.'s defeat in the 2000 Lawsuit, it had forever lost the right to terminate the contract for any reason.

The district court agreed with Dickie Brennan and granted their motion to dismiss the 2004 Lawsuit. *See* App. 7-21. Utilizing the "transactional test" of *res judicata* principles, the district court rejected the notion that Brennan's Inc.'s effort to terminate the contract based on its term of duration (or lack thereof) is different from the earlier causes of action of rescission due to fraudulent inducement and damages for breach of contract. *See id.*

On appeal, the United States Court of Appeal for the Fifth Circuit also sided with Dickie Brennan. *See* App. 1-2. It rejected Brennan's Inc.'s argument that the August 5, 2004, termination letter represents the exercise of an ongoing contractual right rather than a cause of action

that was available and lost in the previous lawsuit. *See id.* Noting that the 1998 Agreement was the locus of both lawsuits, the Fifth Circuit concluded there was no distinction between Brennan's Inc.'s exercising a contractual right and its asserting a cause of action that purportedly could have been asserted in the earlier suit. *See id.* Accusing Brennan's Inc. of merely "rehashing old battles," the Fifth Circuit affirmed the district court's dismissal of the suit. *See id.*

REASONS FOR GRANTING THE PETITION

The Fifth Circuit has decided an important question of federal law: the "same cause of action" test for *res judicata* application. This issue regularly arises in federal practice but surprisingly, has never been settled by this Court. Given the inconsistent application of the various "same cause of action" tests by the several United States circuit courts, the Court should grant writs and establish a clear precedent that can be uniformly applied. Additionally, the Court should overrule the Fifth Circuit's pronouncement that a party who fails to exercise a contractual right during a lawsuit between the parties forfeits the right to do so in a subsequent suit, even if the right had not yet accrued during the pendency of the first suit.

A. This Court Has Never Resolved the Question of What Constitutes the "Same Cause of Action" for *Res Judicata.*

It is universally accepted that an unsuccessful litigant is barred by the doctrine of *res judicata* from re-litigating the same cause of action against the same party in a

subsequent suit. *See, e.g., Brown v. Felsen*, 99 S.Ct. 2205, 2209, 442 U.S. 127, 131 (1979). Yet there is no established rule for how the federal courts should determine what constitutes the "same cause of action." *See* 82 A.L.R. Fed. 829, § 2. This Court has never resolved the question, and it should grant the writ to do so now.

The traditional rule of *res judicata* can be translated from Latin in a legal context as "a matter adjudged" or "a thing adjudicated." *See id.* at § 1. The rule rests on the ground that once a party has litigated, or had the opportunity to litigate, the same matter in a court of competent jurisdiction, that party or its privy should not be permitted to litigate it again to the harassment and vexation of its adversary. *See id.* The rule is necessary to maintain an efficient judicial system that renders final judgments with certainty. It further prevents the inequality of a party's having to litigate the same claim or issue of law repeatedly. As explained by this Court in *Federated Dept. Stores, Inc. v. Moitie*, the doctrine of *res judicata* is "a rule of fundamental and substantial justice, of public policy and private peace, which should be cordially regarded and enforced by the courts." 101 S.Ct. 2424, 452 U.S. 394 (1981).

In diversity cases, this Court has concluded a federal court is bound to apply the *res judicata* principles that the state courts in the state in which the federal diversity court sits. *See Semtek Intern. Inc. v. Lockheed Martin Corp.*, 121 S.Ct. 1021, 531 U.S. 497 (2001). But in federal question cases, such as this one, the *res judicata* question is controlled by federal common law. *See Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 91 S.Ct. 1434, 402 U.S. 313, 324, n.12 (1971). Yet despite the vital importance of the *res judicata* doctrine, the scope of what

does and does not constitute the "same cause of action" in the federal common law has never been resolved by this Court. Instead, the lower courts have been left to apply a variety of tests that attempt to balance the defendant's need for finality with the plaintiff's interest in having his issues and claims fully and fairly litigated.

B. The Various Tests Applied by the United States Circuit Courts.

One such test is the "transactional test," which has been adopted by the Fifth Circuit and others. *See* 82 A.L.R. Fed. 829, § 2, *citing Southmark Properties v. Charles House Corp.*, 742 F.2d 862 (5th Cir. 1984) (additional citations omitted). That test requires an esoteric consideration of whether the facts of both cases are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectation or business understanding or usage. *See* Restatement (Second) of Judgments (1982), § 24. A closely related but slightly different test is one that analyzes whether the "essential" or "operative" facts and issues are the same in both cases. *See id., citing First Pacific Bancorp, Inc. v. Helfer*, 224 F.3d 1117 (9th Cir. 2000) (other citations omitted).

In contrast, the "same evidence" test focuses on whether the key evidence considered in the first judgment would sustain a judgment in the second case. *See, e.g.*, 82 A.L.R. Fed. 829, § 2, *citing Tucker v. Arthur Anderson & Co.*, 646 F.2d 721 (2d Cir. 1981) (other citations omitted). Some decisions have characterized the "same evidence" test as a negative test, explaining that the absence of the "same evidence" does not necessarily mean there exist

distinct causes of action. *See id., citing Ruskay v. Jensen*, 342 F. Supp. 264 (S.D.N.Y. 1972) (other citations omitted).

Another test, the "right-duty" approach, was considered and rejected by the Seventh Circuit in *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589 (7th Cir. 1986). In that case, the appellants lobbied, albeit unsuccessfully, for a *res judicata* analysis involving the rights, duties, and injuries addressed by each cause of action.

The "transactional test" has been adopted by at least seven of the thirteen federal circuit courts, and is admittedly the trend in recent decisions. *See* 82 A.L.R. Fed. 829, § 2. Nevertheless, the entire body of cases on the issue remains inconsistent. As stated diplomatically by the court in *Ramirez v. Brooklyn Aids Task Force*, "the test for determining what constitutes the same cause of action has been articulated by the Second Circuit in various ways." 175 F.R.D. 423, 426 (E.D.N.Y. 1997). This important issue clearly requires clarification.

C. The Prior Decision of this Court Addressing the "Same Cause of Action" Question.

This Court has previously recognized the existence of multiple tests but has never settled on a particular one. In *Nevada v. U.S*, the Court commented that the "transactional" test was "a more pragmatic approach" than the "same evidence" test, but it refrained from favoring one over the other. 103 S.Ct. 2906, n.12, 463 U.S. 110, n.12 (1983). Noting that the "[d]efinitions of what constitutes the 'same cause of action' have not remained static over time," the Court found it unnecessary in that particular case "to parse any minute differences which these differing standards might produce" because the result under either

of those tests was the same. 103 S.Ct. at 2918-2919, 463 U.S. at 130-131.

D. The Necessity of a Clear Directive on the "Same Cause of Action" Test.

Yet the distinctions between the various *res judicata* tests can make all the difference in some cases, such as this one. Applying the "transactional test," the Fifth Circuit in this case concluded that both federal causes of action brought by Brennan's Inc. arose from the same transaction, the 1998 Agreement, and therefore found the 2004 lawsuit barred by *res judicata*.

Under the "same evidence test," however, the Fifth Circuit would have considered only whether the same key evidence in the 2000 Lawsuit would be necessary to sustain a judgment in the 2004 Lawsuit. Clearly, the Fifth Circuit would have reached a different conclusion. The key evidence in the 2000 Lawsuit was Dickie Brennan's misrepresentation or concealment of facts during the negotiations of the 1998 Agreement and whether they had complied with the terms of the 1998 Agreement. In contrast, the only evidence in the 2004 Lawsuit, concerning whether or not the 1998 Agreement contained a term of duration, and if not, whether it was terminated pursuant to Article 2024, would be the 1998 Agreement and the August 5, 2004, letter from Brennan's Inc.

E. The Fifth Circuit Erred in Refusing to Distinguish Between a Contractual Right and a Cause of Action.

Of course, even if the "transactional test" is the proper test for resolving the "same cause of action" question in

the *res judicata* context, Brennan's Inc. strongly asserts the Fifth Circuit misapplied it in this particular case. The Fifth Circuit was wrong to conclude there is no distinction between the exercise of a contractual right and the assertion of a cause of action, and the decision represents an illogical and unwarranted expansion of the *res judicata* doctrine.

When Brennan's Inc. sent Dickie Brennan the termination letter of August 5, 2004, it was exercising a continuing contractual right that is inherent in every contract of indefinite duration governed by Louisiana law. *See* La. C.C. art. 2024. Since Brennan's Inc. had not previously effected such a termination, it had no reason or even ability to assert an Article 2024 cause of action for termination in the 2000 Lawsuit. Had it done so, Dickie Brennan would have responded to the cause of action with an exception of prematurity, asserting Brennan's Inc. had failed to properly exercise its Article 2024 rights by sending the requisite termination letter.

In response to Brennan's Inc.'s argument that an Article 2024 termination represents the exercise of a contractual right rather than a cause of action, the Fifth Circuit concluded:

> This distinction is without effect. "*Res judicata* prevents litigation on all grounds for, or defenses to recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding."

See App. 2.

The Fifth Circuit's conclusion is clearly wrong. Certainly there is a difference between a cause of action that has accrued during the pendency of the earlier suit, on one

hand, and a contractual right that did not ripen until after the earlier suit was resolved, on the other. In effect, the Fifth Circuit's holding means that if parties to a contract choose to litigate over a past breach, they must be sure to trigger every contractual right or grounds for termination that could ever arise under the contract or under Louisiana law in the future. Otherwise, they risk being forever barred from seeking to exercise those rights with respect to future conduct under the contract.

In this case, the net result of the Fifth Circuit's holding is that Brennan's Inc. is perpetually obligated to hold up its end of the contract, but is forever barred from judicially enforcing any obligations owed by Dickie Brennan. Dickie Brennan can breach the 1998 Agreement with impunity, and simply cry "same cause of action" if any suit for enforcement is brought against them. *Res judicata* cannot mandate such an unfair and irrational conclusion.

The Fifth Circuit clearly erred in finding the 2004 Lawsuit barred by *res judicata*. Brennan's Inc. was not merely "rehashing old battles"; it was exercising a contractual right that it did not exercise and could not have exercised in the first suit.

CONCLUSION

In conclusion, the *res judicata* question is one that is extremely common and important. Practitioners routinely struggle with whether or not certain causes of action must be asserted or barred forever by *res judicata*. Others must advise their clients whether a different cause of action is or is not the "same" cause of action and therefore barred by *res judicata* due to prior litigation. Although the Fifth

Circuit has adopted the "transactional test" for guidance with these questions, other circuit courts have been inconsistent. This Court has never weighed in on the question, but it should do so today.

Moreover, the Court should overturn the Fifth Circuit's decision to the extent it unreasonably expands the *res judicata* doctrine. Certainly, *res judicata* should bar a party from re-litigating a cause of action that was or could have been litigated in a prior suit, but it should not bar a party from later exercising a contractual right if that right had not yet accrued at the time of the prior suit.

Accordingly, the Court should grant writs and resolve the important question of what constitutes the "same" cause of action for *res judicata* purposes. It should also overturn the Fifth Circuit's improper expansion of the *res judicata* doctrine to bar the exercise of contractual rights that could not have been asserted in the earlier suit. For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

FRILOT, PARTRIDGE, KOHNKE &
CLEMENTS, L.C.
EDWARD F. KOHNKE IV, T.A.
(La. #7824)
JOSEPH N. MOLE (La. #9538)
MICHAEL H. PINKERTON
(La. #25212)
3600 Energy Centre
1100 Poydras Street
New Orleans, LA 70163-3600
Telephone: (504) 599-8000
Facsimile: (504) 599-8106
Attorneys for Petitioner,
Brennan's Inc.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-30441
Summary Calendar

BRENNAN'S INC,

Plaintiff-Appellant,

versus

RICHARD J. BRENNAN, JR., DICKIE BRENNAN & COMPANY, INC., COUSINS RESTAURANTS, INC., AND SEVEN SIXTEEN IBERVILLE, L.L.C.

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(USDC No. 2:04-cv-2808)

(Filed October 19, 2005)

Before REAVLEY, DAVIS, and PRADO, Circuit Judges.

PER CURIAM:*[1]

Reviewing the record de novo, we agree with the district court's order and affirm the judgment of dismissal for the following reasons:

1. The 1998 contractual agreement between the parties has been the locus of both the current and previous

---

*[1] Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

lawsuits. In the previous lawsuit, the jury did not grant the plaintiff's request to cancel the contract, although it awarded $250,000 in trademark damages. Last year, this court rejected plaintiff's attack upon the contract. *Brennan's Inc. v. Dickie Brennan & Co.*, 376 F.3d 356 (5th Cir. 2004). After the conclusion of the first lawsuit, the plaintiff sent the defendant a contract termination letter specifically implicating Louisiana Civil Code Article 2024. As the district court said, there was no impediment to raising plaintiff's alternative theory of termination under Article 2024 in the first suit.

2. The plaintiff argues an Article 2024 termination represents the exercise of a contractual right rather than a cause of action. This distinction is without effect. "Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Brown v. Felsen*, 442 U.S. 127, 131, 99 S. Ct. 2205, 2209 (1979). Having failed to raise its Article 2024 argument in the original suit on the 1998 contract, the plaintiff is unable to file a new suit for purposes of rehashing old battles.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

BRENNAN'S, INC.	CIVIL ACTION
VERSUS	NO. 00-2413
DICKIE BRENNAN AND CO., INC., *ET* AL.	SECTION "S" (1)

JUDGMENT

(Filed Dec. 13, 2002)

This captioned matter came on for trial by jury on October 28, 2002. Brennan's, Inc. was represented by Edward T. Colbert, T. Cy Walker, and William M. Merone of Kenyon & Kenyon, Washington, D.C., and by Leon H. Rittenberg Jr. of Baldwin & Haspel, L.L.C., New Orleans, Louisiana. The defendants, Dickie Brennan & Company, Inc., Cousins Restaurants, Inc., Seven Sixteen Iberville, L.L.C., Richard J. Brennan Jr., and Richard J. Brennan Sr. were represented by Gary J. Elkins, Richard L. Traina and J. Shea Dixon of Elkins, P.L.C., New Orleans, Louisiana.

With the consent of the parties, the trial was bifurcated by the court, with the liability and damages phases being tried separately. After hearing evidence as to liability, and after being instructed by the Court, the jury retired on Wednesday, November 6, 2002 to deliberate. On Thursday, November 7, 2002, the jury returned and rendered its verdict as to liability by answering special jury interrogatories. The jury interrogatory form was duly signed by the presiding juror and, after the reading of the responses to the jury interrogatories, the jurors were polled by the court and each represented that the responses to the jury interrogatories was his or her verdict.

Accordingly, the court hereby enters judgment on the issue of liability in accordance with the jury's responses to the jury interrogatories propounded to it, as follows:

1. Richard J. Brennan Jr. did not fraudulently induce Brennan's to enter into the 1998 Agreement.

2. Richard J. Brennan Jr. breached the 1998 Agreement by using the name "Brennan's" in a manner not authorized by the 1998 Agreement in connection with "Dickie Brennan's Steakhouse" and "Dickie Brennan & Co.," but Richard J. Brennan Jr. did not breach the 1998 Agreement in connection with "Dickie Brennan's Palace Cafè."

3. There exists a likelihood of confusion inconsistent with the intention of the 1998 Agreement with respect to Richard J. Brennan Jr.'s use of the name "Brennan's."

4. Richard J. Brennan Jr. became aware of a perceived likelihood of confusion or instances of actual confusion as the result of the use made by Brennan's, Inc. and Richard J. Brennan Jr. of their respective marks, but Richard J. Brennan Jr. failed to promptly notify Brennan's, Inc. of such a perceived likelihood of confusion or instances of actual confusion and failed to take prompt and effective measures in full cooperation with Brennan's, Inc. to eliminate such confusion.

5. Richard J. Brennan Jr.'s failure to take prompt and effective measures to eliminate such confusion was not prevented by a lack of cooperation by Brennan's, Inc.

6. Both Richard J. Brennan Jr. and Brennan's, Inc. acted in good faith.

7. Although Richard J. Brennan Jr. breached the 1998 Agreement, the breach is not sufficiently serious to justify dissolution of the 1998 Agreement, and, accordingly, Richard J. Brennan, Jr. is hereby **ORDERED** to specifically perform his obligations under the 1998 Agreement from November 8, 2002, forward.

The jury then heard evidence on November 7 and 8, 2002, with respect to damages. On Friday, November 8, 2002, after being instructed by the Court, the jury retired to deliberate on the issue of damages, after which the jury returned and rendered its verdict as to damages by awarding $250,000 to Brennan's, Inc. as a result of Richard J. Brennan, Jr.'s breach of the 1998 Agreement.

Accordingly, it is the judgment of the court that Richard J. Brennan, Jr. is hereby **ORDERED** to pay the amount of TWO HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS ($250,000), plus interest and costs, to Brennan's, Inc.

Brennan's, Inc. also asserted a claim against Richard J. Brennan Sr. for breach of the 1979 Agreement. After the jury was instructed that the court had ruled prior to trial that Richard J. Brennan Sr. had breached the 1979 Agreement, Brennan's, Inc., through Mr. Rittenberg, represented to the court that Brennan's, Inc. was waiving its claim against Richard J. Brennan Sr. for breach of contract damages, reserving whatever rights it may have to seek attorney's fees from Richard J. Brennan Sr. under the 1979 Agreement through a post-trial motion, and also reserving its right on appeal to argue that Richard J.

Brennan Sr. is liable to Brennan's, Inc. for damages for trademark infringement.

Accordingly, it is **ORDERED** that, although the court ruled that Richard J. Brennan, Sr. breached the 1979 Agreement, Brennan's, Inc.'s claim against Richard J. Brennan, Sr. for breach of contract damages has been waived and is accordingly, **DISMISSED**. It is **FURTHER ORDERED** that Brennan's, Inc.'s right to seek attorney's fees from Richard J. Brennan Sr. under the 1979 Agreement be and it is hereby **RESERVED** and will be determined by the court through post trial motion practice. It is **FURTHER ORDERED** that the right of Brennan's, Inc. to argue on appeal that Richard J. Brennan Sr. is liable to Brennan's Inc. for trademark infringement damages, is **PRESERVED**.

New Orleans, Louisiana this 12th day of December, 2002.

/s/ Mary Ann Vial Lemmon
Mary Ann Vial Lemmon
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

BRENNAN'S, INC.	**CIVIL ACTION**
VERSUS	**NO. 04-2808**
RICHARD J. BRENNAN, JR., *ET AL.*	**SECTION "S" (5)**

ORDER AND REASONS

(Filed Apr. 11, 2005)

IT IS ORDERED that defendants' Motion to Dismiss (Document 8) is hereby **GRANTED**.

A. Background.

Plaintiff, Brennan's, Inc., the owner and operator of *Brennan's Restaurant*, holds a federal trademark in "Brennan's" and certain related marks. Defendant, Cousins Restaurants, Inc. owns and operates *Dickie Brennan's Palace Café*, while defendant Seven Sixteen Iberville, L.L.C. owns and operates *Dickie Brennan's Steakhouse*. Defendant Dickie Brennan & Company, Inc., provides marketing and promotional services for these restaurants. Defendant Richard J. Brennan, Jr. is an officer and member of Cousins, Seven Sixteen, and Dickie Brennan & Company.

In this action Brennan's, Inc. has sued defendants (1) for a declaratory judgment that a contract executed by Richard, Jr. dated October 1, 1998, which plaintiff alleges is the only source for Richard, Jr.'s right to use the names *Dickie Brennan's Steakhouse* and *Dickie Brennan's Palace Café*, has been terminated and is no longer in effect; and (2) for injunctive relief against Richard, Jr. under federal

trademark law to prevent his alleged misuse of these names. Defendants have moved to dismiss Brennan's, Inc's suit based on the doctrine of *res judicata*. In order to understand the context of this motion, it is necessary to detail a prior suit involving the parties.

1. The prior suit: *Brennan's, Inc., et al. v. Dickie Brennan & Co., Inc., et al.*, Case No. 00-2413.

On August 15, 2000, Brennan's, Inc. and its principals[1] filed Case No. 00-2413 against the current defendants and Richard J. Brennan, Sr., asserting claims for federal trademark dilution, trademark infringement, unfair competition, false representation, false designation of origin, and related state law causes of action against defendants, generally alleging that defendants' use of the names *Dickie Brennan's Steakhouse* and *Dickie Brennan's Palace Café* in connection with restaurant services violated federal and state law. Brennan's, Inc. alleged that the operation of the two restaurants had caused and was likely to cause confusion among consumers.[2] The prior suit expressly sought termination of a contract between Brennan's, Inc. and Richard, Jr. dated October 1, 1998 (the "1998 Agreement") based on a breach thereof.

Under the 1998 Agreement, Brennan's, Inc. agreed not to "object to the operation by Richard Brennan, Jr. of restaurants under the name and marks DICKIE BRENNAN'S PALACE CAFÉ and DICKIE BRENNAN'S

---

[1] Owen E. Brennan, Jr., James C. Brennan, and Theodore M. Brennan.

[2] Case No. 00-2413, Document 20, at ¶¶ 31, 43.

STEAKHOUSE, or under other names which may be opened in the future, so long as:"

1. The use of BRENNAN'S by Richard Brennan Jr. shall always be accompanied by the name DICKIE and the term BRENNAN'S shall not be of greater size or prominence than the name DICKIE, and shall be arranged so as to present a combined name of DICKIE BRENNAN'S, as proprietor;

2. The use of DICKIE BRENNAN'S shall be used in conjunction with the remaining portions of the names and marks so as to present a unified name and mark, such as DICKIE BRENNAN'S PALACE CAFÉ and DICKIE BRENNAN'S STEAKHOUSE, and the name DICKIE BRENNAN'S shall not be of greater size or prominence than the remaining portion of the restaurant name;

3. The names and service marks of Richard Brennan identified as being permitted hereunder shall not appear in script style; except as shown on Exhibit "A" attached hereto; and

4. No connection is made, promoted, or suggested between any restaurant operated by Richard Brennan Jr. and any restaurant operated under a name or mark owned or licensed by Brennan's Inc., including but not limited to those identified above. By way of example but not limitation, use by Richard Brennan Jr. of terminology such as "original" or "famous" would imply such a connection.

In addition to these four numbered limitations, the 1998 Agreement provided that:

In the event Richard Brennan Jr. becomes aware of any perceived likelihood of confusion or any instance of actual confusion as the result of the use made by each party of their respective marks, Richard Brennan Jr. shall promptly notify Brennan's Inc., and take prompt and effective measures, in full cooperation with Brennan's Inc., to eliminate such confusion.

The rights granted hereunder are personal to Richard Brennan Jr. and may not be assigned, licensed or otherwise encumbered without prior consent of Brennan's, Inc., except that they may be assigned to the heirs hereto.

Case No. 00-2413 was tried to a jury from October 29 to November 8, 2002. The jury had to resolve the issue whether Richard, Jr. breached the 1998 Agreement. If so, the jury had to determine whether the breach was sufficiently serious to dissolve the contract. On November 7, 2002, the jury rendered its verdict, finding that Richard, Jr.'s use of the term "Brennan's" in connection with *Dickie Brennan's Steakhouse* and Dickie Brennan and Co., Inc. breached the 1998 Agreement and awarding damages incurred because of the breach up to the time of the trial.[3]

---

[3] The jury interrogatories asked:

Do you find by a preponderance of the evidence that Richard Brennan, Jr. breached the 1998 Agreement by using the name Brennan's in a manner not authorized by the 1998 Agreement?

a. In connection with Dickie Brennan's Steak House

_x_ Yes ___ No

b. In connection with Dickie Brennan's Palace Café

___ Yes _x_ No

c. In connection with Dickie Brennan and Co.

_x_ Yes ___ No

(Continued on following page)

However, the jury determined that the breach was not serious enough to warrant dissolution of the contract, and could be remedied by requiring Richard, Jr. to specifically perform his obligations under the 1998 Agreement.[4]

On December 13, 2002, the court entered a final judgment in Case No. 00-2413 in accordance with the jury's verdict, stating in part:

> 2. Richard J. Brennan, Jr. breached the 1998 Agreement by using the name "Brennan's" in a manner not authorized by the 1998 Agreement in connection with "Dickie Brennan's Steakhouse" and "Dickie Brennan & Co.," but Richard J. Brennan, Jr. did not breach the 1998 Agreement in connection with "Dickie Brennan's Palace Café."
>
> * * *
>
> 7. Although Richard J. Brennan, Jr. breached the 1998 Agreement, the breach is not sufficiently serious to justify dissolution of the 1998 Agreement, and, accordingly, Richard J. Brennan, Jr. is hereby **ORDERED** to specifically perform his

---

See Case No. 00-2413, "Jury Interrogatories" No. 2 (attached to Document 293).

[4] The jury interrogatories asked further:

If you have found that Richard Brennan, Jr. breached the agreement . . . which of the following do you find:

___ a. That the type of breach is sufficiently serious to justify dissolution of the 1998 Agreement.

_x_ b. That the type of breach can be remedied by requiring Richard Brennan, Jr. to specifically perform the obligations under the 1998 Agreement from this date forward.

See Case No. 00-2413, "Jury Interrogatories" No. 4 (attached to Document 293).

obligations under the 1998 Agreement from November 8, 2002 forward. [5]

2. The current suit.

In the current suit plaintiff Brennan's, Inc. has sued Richard, Jr., Dickie Brennan & Co., Cousins, and Seven Sixteen for a declaratory judgment and injunctive relief. Brennan's, Inc. alleges that the 1998 Agreement "has no term," and therefore "can be terminated by any party thereto upon reasonable notice" pursuant to Civil Code article 2024.[6] Brennan's, Inc. alleges:

> On August 5, 2004, Brennan's Inc. served notice on Richard J. Brennan, Jr. that it had elected to terminate the 1998 contract pursuant to Louisiana law, and that Richard J. Brennan, Jr. had 60 days notice of such termination. Richard J. Brennan, Jr. was further informed that as of 60 days from the date of said termination notice, or as of October 5, 2004, he was instructed to cease using the name Brennan's in connection with any restaurant operation, inasmuch as the 1998 Agreement would not longer be in force.[7]

The August 5, 2004 letter states, in its entirety:

> Reference is made to the Agreement between you and Brennan's, Inc., signed by you on or about November 16, 1998 (the "Agreement"). On behalf of Brennan's, Inc., you are hereby notified that said Agreement is terminated. Please be

---

[5] Case No. 00-2413, Document 303.

[6] Complaint at ¶ 15.

[7] *Id.* at ¶ 16.

> advised that as of October 5, 2004, or sixty (60) days from the date of this letter, any use by you, or by any person acting on your behalf, or by any legal entity in which you have any interest, of the trademarks referenced in the Agreement, including but not limited to the service mark "Brennan's" in connection with operation of any restaurant or other business, on any advertising, or on any other printed material, will be a violation of those trademarks.
>
> While Brennan's Inc. believes you are in breach of the Agreement, this termination notice is specifically not based on any such breach. Rather, this termination is based upon Louisiana Civil Code Article 2024, inasmuch as the Agreement is of indefinite duration. Brennan's Inc. specifically hereby reserves its right to ask the appropriate court to terminate the Agreement for the additional reason that you continue to breach the Agreement in violation of the December 12, 2002 Judgment of the United States District Court for the Eastern District of Louisiana, Case No. 00-2413.

Brennan's, Inc. alleges, and Richard, Jr. does not dispute, that "[n]otwithstanding the notice given to Richard J. Brennan, Jr. to cease use of the Brennan's trademark, he has ignored Brennan's Inc.'s termination notice and continues to use the name Brennan's in connection with restaurant operations."[8] Count One of the Complaint seeks a judgment declaring that the termination letter "was effective to cause the dissolution of the 1998 Agreement and that it is therefore no longer effective, as of that

---

[8] *Id.* at ¶ 17.

date."[9] Count Two seeks injunctive relief to prevent Richard, Jr.'s violation of plaintiff's trademark rights.[10]

B. Analysis.

Defendants argue that the current suit is barred by the *res judicata* effect of the final judgment in Case No. 00-2413. Federal law "determine[s] the preclusive effect of a federal judgment, even if that judgment was based on state law." *Mowbray v. Cameron County, Texas*, 274 F.3d 269, 281 (5th Cir. 2001), *cert. denied*, 535 U.S. 1055, 122 S.Ct. 1912, 152 L.Ed.2d 822 (2002).

The Fifth Circuit has recognized that *res judicata* "bars all claims that were or *could have been* advanced in support of the cause of action on the occasion of its former adjudication." *Davis v. Dallas Area Rapid Transit*, 383 F.3d 309, 312-13 (5th Cir. 2004) (italics in original). The test for *res judicata* has four elements: (1) the parties must be identical or in privity, (2) the judgment in the prior action must have been rendered by a court of competent jurisdiction, (3) the prior action must have been concluded by a final judgment on the merits, and (4) the same claim or cause of action must be involved in both suits. *Id.* Brennan's, Inc. disputes whether this suit involves the same claim or cause of action as Case No. 00-2413.

In determining whether two suits involve the same claim, the Fifth Circuit has adopted the transactional test of the *Restatement (Second) of Judgments*. *Matter of Southmark Corp.*, 163 F.3d 925, 934 (5th Cir. 1999), *cert.*

---

[9] *Id.* at ¶ 20.

[10] *Id.* at ¶ 21.

denied, 527 U.S. 1004, 119 S.Ct. 2339, 144 L.Ed.2d 236 (1999). Under this test:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction," and what groupings constitute a "series," are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Restatement (Second) of Judgements, § 24 (1982). In determining the scope of the relevant transaction:

> "Transactions may be single despite different harms, substantive theories, measures or kinds of relief. . . . That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several legal theories depend on different shadings of the facts, or would call for different measures of liability or different kinds of relief."

Matter of Interlogic Trace, Inc., 200 F.3d 382, 386 n. 3 (5th Cir. 2000) (quoting *Restatement (Second) of Judgments* § 24, comment c. (1982)). "One major function of claim

preclusion is to force a plaintiff to explore all the facts, develop all the theories, and demand all the remedies in the first suit." 18 Charles A. Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure* § 4408, at 185 (2002). It is therefore "clear" under the transactional test that "a mere change in legal theory does not create a new cause of action." *Id.* § 4407, at 179; *see also* 18 James W. Moore, *Moore's Federal Practice* § 131.21[3][a], at 131-43-44 (3rd ed. 2004) ("[A] claim is coterminous with a transaction or series of transactions, regardless of the number of different legal theories that may arise as a result of plaintiff's alleged damages. . . . The fact that plaintiff's counsel in the first action didn't happen to think of the theory advanced in the second action will also fail to avoid preclusion.").[11]

---

[11] These principles are also in accord with Louisiana *res judicata* law, which provides that if a judgment is rendered in favor of a defendant, "all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action." LSA-R.S. 13:4231(2). The Official Comment to the 1990 revision of this provision states:

> Under present law a second action would be barred by the defense of res judicata only when the plaintiff seeks the same relief based on the same cause or grounds. This interpretation of res judicata is too narrow to fully implement the purpose of res judicata which is to foster judicial efficiency and also to protect the defendant from multiple lawsuits. For example, in *Mitchell v. Bertolla*, 340 So.2d 287 (La.1976), the plaintiff sued unsuccessfully to rescind the lease for lesion beyond moiety and nonpayment of the rent, and then sued to rescind the same lease for fraud. The supreme court held that the second action was not barred by res judicata because it was based on a different cause (the legal principle upon which the demand is based). Under new R.S. 13:4231, the second action would be barred because it arises out of the occurrence which was the subject matter of the first action.

(Continued on following page)

The court finds that plaintiff's claim that the 1998 Agreement is terminable at will under Article 2024 of the Louisiana Civil Code is barred by *res judicata.* Case No. 00-2413 involved the claim that the 1998 Agreement should be terminated. The only grounds asserted for termination was Richard, Jr.'s breach.

In the current suit, plaintiff has changed theories, and now argues that the 1998 Agreement should be terminated because the agreement was terminable at will pursuant to Article 2024, grounds that were in existence at the time of the first suit. Under the *Restatement's* transactional test, "a contract is generally considered to be a single transaction for purposes of claim preclusion." 18 *Moore's Federal Practice* § 131.23, at 131-61. This principle is illustrated in the *Restatement*:

> A brings an action against B for the cancellation of a contract made with B, alleging that the contract was procured by the undue influence and fraud of B. After verdict and judgment for B, A brings a new action for the cancellation of the contract, alleging mental incompetency of A. The prior judgment is a bar.

Restatement (Second) of Judgments, § 25, Illustration 7. There was no impediment to raising plaintiff's alternative theory of termination under Article 2024 in the first suit. Plaintiff argues that "Brennan's could not have asked for the same declaratory relief it seeks herein in connection

---

Although Louisiana law is not at issue in the case, Louisiana res judicata law (LSA-R.S.13:4231) "was broadened by the 1990 amendment and is now in line with federal provisions." *Mandalay Oil & Gas, L.L.C. v. Energy Development Corp.,* 880 So.2d 129, 142 (La.App. 1st Cir.2004), *writ denied,* 893 So.2d 72 (La. 2005).

with the 2000 litigation, because this case is entirely based on occurrences since the date of the judgment in the 2000 litigation."[12] However, the only such "occurrence" identified by plaintiff is the notification of termination in the letter on August 5, 2004. Plaintiff had the unilateral ability of providing such notice of termination prior to or during the first litigation, thereby satisfying the only precondition to asserting its alternative theory of termination.[13]

The "pragmatic" factors used in applying the transactional test demonstrate the identity of plaintiff's claims in the two suits. Both claims are related in origin and motivation because both originate in and are motivated by Brennan's, Inc.'s quest to prevent Richard, Jr. from using the term "Brennan's." The two claims form part of a

---

[12] Document 13, at p. 3.

[13] Wright, Miller, and Cooper recognize that "[a] single transaction may support demands for relief based on two or more theories, one of which is not ripe or is subject to a precondition while another is ripe and not subject to the precondition," and indicate that:

> There is much to be said for requiring the plaintiff to inform the court of the theories that are not yet eligible for litigation, and to argue the need for immediate action on the theory that is eligible for present disposition. The court then can determine whether there is good reason to proceed to dispose of the theory that is ready for disposition, or whether it is better to stay proceedings until all matters can be resolved at once.

18 *Federal Practice and Procedure* § 4412, at 312. Several courts have held that a plaintiff may not split a claim by litigating a discrimination suit under state law to judgment and later asserting a federal claim arising out of the same transaction after obtaining a "right to sue" letter. *E.g., Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1187 (11th Cir.), *cert. denied*, 540 U.S. 1016, 124 S.Ct. 568, 157 L.Ed.2d 430 (2003). Even though the "right to sue" letter is a precondition of the federal claim that was unsatisfied at the time of the first judgment, the judgment is *res judicata* to the assertion of the subsequent federal claim. *Id.*

convenient trial unit, and could easily have been litigated together in the first suit. There was no reason for defendants to believe during the extensive prior litigation that they would face additional efforts to terminate the 1998 Agreement.

Res judicata is a "salutary" principle that "serves vital public interests." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981). The Supreme Court has recognized that "'public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.'" *Id.; see also Jackson v. F.I.E. Corp.*, 302 F.3d 515, 529 (5th Cir. 2002) (*res judicata* protects "private and public values" such as "repose, finality, and efficiency"). The time for Brennan's, Inc. to litigate whether the 1998 Agreement was terminable at will under Article 2024 was in the prior suit in which it sought to terminate the agreement based on a breach thereof. Brennan's, Inc. is now barred by *res judicata* from seeking to terminate the agreement in a new suit based on a new theory.

C. Conclusion.

Defendants' motion to dismiss is granted.[14]

New Orleans, Louisiana this 11 day of April, 2005.

/s/ Mary Ann Vial Lemmon
Mary Ann Vial Lemmon
United States District Judge

[14] At oral argument on defendants' motion, counsel for Brennan's, Inc. represented that Brennan's, Inc. is not asserting a claim for breach of the 1998 Agreement. The only claims brought by Brennan's, Inc. in this suit are (1) for a judicial declaration that the 1998 Agreement was terminable at will under Article 2024 of the Louisiana Civil Code, and (2) for injunctive relief to prevent the violation of its trademarks. The court's ruling that Brennan's, Inc.'s claim for declaratory judgment is barred by *res judicata* results in the dismissal of both claims.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

BRENNAN'S, INC.	**CIVIL ACTION**
VERSUS	**NO. 04-2808**
RICHARD J. BRENNAN JR., *ET AL.*	**SECTION "S" (5)**

JUDGMENT

(Filed Apr. 11, 2005)

Considering the court's Order and Reasons of April 11, 2005,

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of defendants Richard J. Brennan, Jr., Dickie Brennan & Company, Inc., Cousins Restaurants, Inc., and Seven Sixteen Iberville, L.L.C. and against plaintiff Brennan's, Inc. dismissing plaintiff's claims with prejudice.

New Orleans, Louisiana this 11 day of April 2005.

/s/ Mary Ann Vial Lemmon
Mary Ann Vial Lemmon
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-30441

BRENNAN'S INC

Plaintiff-Appellant

v.

RICHARD J BRENNAN, JR; DICKIE BRENNAN & COMPANY INC; COUSINS RESTAURANTS INC; SEVEN SIXTEEN IBERVILLE LLC

Defendants-Appellees

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

---

ON PETITION FOR REHEARING EN BANC

(Filed Nov. 17, 2005)

(Opinion 10/19/05, 5 Cir., ___, ___ F.3d ___)

Before REAVLEY, DAVIS, and PRADO, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P.

and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit
Judge

2)

Supreme Court, U.S.
FILED
MAR 2 0 2006
OFFICE OF THE CLERK

No. 05-1040

In The
Supreme Court of the United States

BRENNAN'S, INC.,

Petitioner,

v.

RICHARD J. BRENNAN, JR., DICKIE BRENNAN & COMPANY, INC., COUSINS RESTAURANTS, INC. AND SEVEN SIXTEEN IBERVILLE, L.L.C.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

GARY J. ELKINS
YVONNE CHALKER
Counsel of Record
ELKINS, P.L.C.
210 St. Charles Avenue
Suite 4400
New Orleans, LA 70170-4400
Telephone: (504) 529-3600
Facsimile: (504) 599-8106

Attorneys for Respondents,
Richard J. Brennan, Jr.,
Dickie Brennan & Company, Inc.,
Cousins Restaurants, Inc. and
Seven Sixteen Iberville, L.L.C.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

(1) Respondents have no objection to the first question presented by Petitioner.

(2) If the proper test for application of federal *res judicata* principles is the "transactional" test, is a party that brings an action against another to terminate a contract forever barred from bringing a subsequent action seeking to terminate that same contract on the basis of an alternative ground for termination that could have, and should have, been raised at the time of the first action, but which was not so asserted?

CORPORATE DISCLOSURE STATEMENT

Plaintiff-petitioner, Brennan's, Inc., does not have a parent company, and there is no publicly held company that owns more than 10% of its stock. Defendant-respondent, Richard J. Brennan, Jr. is an individual. None of defendants-respondents, Dickie Brennan & Company, Inc., Cousins Restaurants, Inc. and Seven Sixteen Iberville, L.L.C. have parent companies, nor is there any publicly held company that owns more than 10% of any of their stock or membership interests, as the case may be.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

JURISDICTION

Petitioner has failed to demonstrate an adequate basis for this Court to exercise its discretionary jurisdiction under Rule 10 of the Rules of this Court, for the reasons that (i) Petitioner has failed to establish a conflict between the courts of appeals with respect to the issues presented, as required by Rule 10(a), and (ii) Petitioner has failed to present an important question of federal law that has not previously been settled by this Court, as required by Rule 10(c), all as more fully discussed in Sections A and B hereinafter.

INTRODUCTION

Claim splitting and piecemeal litigation have never been favored by this Court. As early as 1877, this Court had held that:

> '[It is undoubtedly a settled principle that a] party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible.'

Baltimore Steamship Company, et al., v. Phillips, 274 U.S. 316, 320 (1927) (*quoting Stark v. Starr*, 94 U.S. 477, 485 (1877)).

In the matter now before this Court, Petitioner, Brennan's, Inc. ("Brennan's"), did exactly what this Court, in the quoted passage, has expressly proscribed. In 2000, Brennan's filed a lawsuit referred to hereinafter as "*Brennan I*," seeking the termination, on several grounds, of a contract that it had entered into with Respondent, Richard J. Brennan, Jr. ("Dickie") in 1998 (the "1998 Agreement"). In 2004, after the entry of a final judgment rejecting Brennan's efforts to terminate the 1998 Agreement, it simply filed the current lawsuit, referred to hereinafter as "*Brennan II*", seeking the same relief that it had sought in the first – *i.e.*, termination of the 1998 Agreement -- on an alternative ground that was available to it at the time of the first action, but which was not asserted.

The Fifth Circuit saw the current lawsuit for exactly what it is – nothing more than an attempt to "rehash old battles"[1] over the family surname. The conflict began, not in 2000 with the filing of *Brennan I*, but in 1976, when Brennan's and its owners filed a similar lawsuit against their uncle, Richard J. Brennan, Sr. ("Richard, Sr."), Dickie's father, other family members, and the restaurant companies owned by them.[2] To settle that litigation,

[1] *See* Opinion of U.S. Fifth Circuit Court of Appeals in *Brennan's, Inc. v. Richard J. Brennan, Jr., et al.*, 05-30411 (5th Cir. 2005) (*per curiam*), appearing in the Appendix to Brennan's Petition for Writ of Certiorari (hereinafter, the "Petition"), pp. 1-2.

[2] "Brennan's Restaurant" on Royal Street in New Orleans was founded by Owen E. Brennan, the father of the three brothers who currently own Brennan's (the "Brothers"), and the brother of Dickie's father, Richard, Sr. Owen E. died in late 1955, after which, the restaurant continued under the management of Owen E.'s siblings, including Richard, Sr., and the Brothers. Other restaurant holdings were also acquired by the family. In 1974, the family restructured their restaurant businesses and the Brothers became sole owners of Brennan's

(Continued on following page)

Brennan's, the Brothers and their mother, on the one hand, and Richard, Sr., his siblings and their restaurant companies, on the other, entered into a settlement agreement in 1979, pursuant to which Brennan's received the right to use the federally registered trademark, "Brennan's," in connection with restaurant services in Louisiana.

In the fall of 1998, the Brothers became aware that their cousin, Dickie, was preparing to open a restaurant in New Orleans by the name of "Dickie Brennan's Steakhouse." Subsequently, they arranged a meeting with Dickie, at which they asked Dickie to execute the 1998 Agreement, which provided that Brennan's would not object to Dickie's use of his name in connection with his restaurant operations, so long as certain conditions specified in the 1998 Agreement were met. Although he did not believe that he needed Brennan's permission to use his own name on his restaurants, Dickie agreed to sign the 1998 Agreement in the hope that his gesture might be a step toward mending damaged relationships among members of the different branches of the family. Just over a year after signing the 1998 Agreement, Brennan's filed *Brennan I* in an attempt to terminate the 1998 Agreement. Dickie now operates three New Orleans restaurants that use "Dickie Brennan's" as part of their names, as expressly permitted by the 1998 Agreement.

Brennan I, apparently, advanced every available theory for termination of the 1998 Agreement, except the one

Restaurant. The 1976 suit was captioned *Brennan's Inc. v. Brennan's Restaurants, Inc., et al.*, No. 76-1535 "F" on the docket of the United States District Court for the Eastern District of Louisiana.

asserted in the current suit. It is black-letter law, however, that "a final judgment on the merits of an action precludes the parties or their privies from relitigating [claims] that were *or could have been raised in that action.*" *Federated Department Stores, Inc., et al. v. Moitie*, 452 U.S. 394, 399 (1981), (*citing Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); *Cromwell v. County of Sac*, 94 U.S. 351, 352-353 (1877)). As will be demonstrated, the grounds asserted in this action for termination existed at the time Brennan's filed and tried its first termination suit and, accordingly, as the district court and court of appeals held, this action is barred by the application of the principles of *res judicata* – whether by application of the "transactional" test utilized by the Fifth Circuit, or the "same evidence" test advocated by Brennan's herein.

STATEMENT OF THE CASE

Before the Court is the issue of whether the second of two federal court lawsuits filed by Brennan's against the Dickie Brennan Group to terminate the 1998 Agreement involves the "same cause of action" for purposes of *res judicata* and is, therefore, barred. The first suit, which will be referred to hereinafter as, *Brennan I,* was filed in the United States District Court for the Eastern District of Louisiana on August 15, 2000.[3] Therein, Brennan's asserted federal claims for trademark infringement, unfair competition, false representation, false designation of

[3] The case was styled, *Brennan's Inc., et al. v. Dickie Brennan & Company, Inc., et al.*, No. 00-2413 on the docket of the United States District Court for the Eastern District of Louisiana, *aff'd. in part, rev'd. in part and remanded*, 376 F.3d 356 (5th Cir. 2004).

origin and dilution under federal and Louisiana trademark law, arising out of alleged breaches of the 1998 Agreement by the Dickie Brennan Group. Brennan's also sought nullification of the 1998 Agreement on the ground that Dickie had allegedly fraudulently induced it to enter into the 1998 Agreement. Brennan's further claimed that Dickie had materially breached the 1998 Agreement and that it should be judicially terminated as a result. Brennan's ultimate objective was to have the 1998 Agreement terminated, on any grounds and under any theory available, so that it could try to prevent Dickie from using his name on his restaurants.

Brennan I was tried before a jury, over a two-week period in late October-early November, 2002. To Brennan's utter dismay, the jury found that Dickie had not fraudulently induced Brennan's to enter into the 1998 Agreement and that Dickie had not breached the 1998 Agreement in such a way as to warrant its termination. The jury's verdict, instead, upheld the validity and effectiveness of the 1998 Agreement and maintained it in full force and effect, subject to Dickie's obligation of performance – certainly not the result that Brennan's desired or expected.

Brennan's filed post-trial challenges to the jury's verdict, which were rejected by the district court. Brennan's then appealed to the Fifth Circuit Court of Appeals. On appeal, Brennan's challenged the jury's verdict on the issue of fraudulent inducement, but did not appeal the jury's verdict on the issue of whether the 1998 Agreement should be terminated on account of alleged egregious, material breaches of it. On June 28, 2004, the Fifth Circuit rendered judgment remanding to the district court certain federal trademark issues, and affirming, in all respects, the jury's verdict on the issue of fraudulent inducement – *i.e.*, that Dickie did not fraudulently induce Brennan's into

entering into the 1998 Agreement, as well as the determination that the 1998 Agreement should not be terminated. Thus, the 1998 Agreement remained in full force and effect following the Fifth Circuit's opinion in *Brennan I*. The judgment in *Brennan I* is now final between Brennan's and the Dickie Brennan Group as to all claims asserted in *Brennan I, and,* under the doctrine of *res judicata,* as to *"all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." Brown v. Felsen,* 442 U.S. 127, 131 (1979).

Vexed by, and dissatisfied with, the outcome of *Brennan I*, Brennan's then fired both the nationally known trademark attorneys and the local attorneys who had represented it in *Brennan I* and hired new counsel to represent and advise it, going forward, with regard to the remanded trademark issues. Brennan's ultimately elected not to assert any claims on remand, instead choosing to pursue yet another theory for terminating the 1998 Agreement that had been "discovered" by its new counsel– namely, that the 1998 Agreement is terminable at Brennan's whim under Louisiana Civil Code Article 2024 because it allegedly does not contain a term.

After its "discovery" of the new contractual termination theory – a ground for termination which was available at the time of *Brennan I*, but which was not asserted and obviously not discovered by Brennan's former counsel – Brennan's new counsel sent a letter to Dickie, dated August 5, 2004, (the "August 5 Letter"), notifying him that Brennan's was exercising its purported right, under Louisiana Civil Code Article 2024, to terminate the 1998 Agreement. The August 5 Letter notified Dickie that the 1998 Agreement was being terminated and demanded that Dickie cease the use of the name "Brennan" in connection

with his restaurant operations on or before October 5, 2004, the same relief sought in *Brennan I*.

Dickie did not, and does not, recognize any right of termination under Louisiana Civil Code Article 2024 and did not acquiesce in Brennan's demand that he cease using his name in connection with his restaurant operations. Although *Brennan I* was still on remand at the time, Brennan's filed a *new* complaint in the United States District Court for the Eastern District of Louisiana, against the Dickie Brennan Group, seeking termination of the 1998 Agreement under Article 2024, and injunctive relief. Although, for strategic reasons, Brennan's filed its second termination suit as a separate complaint, rather than as a matter pendent to its then-existing remaining claims for trademark infringement under the same 1998 Agreement, the case is really nothing more than the continuation of *Brennan I*, the ultimate goal of which, was to have the 1998 Agreement judicially terminated.

The new suit, *Brennan II*, was ultimately assigned to the same district judge who presided in *Brennan I*. In response to the new complaint, the Dickie Brennan Group filed a Motion to Dismiss the complaint under F.R.C.P. 12(b) based on *res judicata*.

On April 11, 2005, the district court, in a well reasoned opinion, granted the motion to dismiss. *See* District Court Opinion in *Brennan II*, App. to Petition, p. 3. The court noted that the only area of dispute between the parties for purposes of *res judicata* analysis was whether *Brennan I* and *Brennan II* involved the "same claim or cause of action." The court applied the "transactional" test of the *Restatement (Second) of Judgments*, § 24 (1982) (the "*Restatement*"), the test adopted by the Fifth Circuit for analyzing whether actions involve the "same claim or cause of action," and

specifically found that both actions sought termination of the 1998 Agreement, and that, although the grounds for termination were different in the two cases, the theory, or grounds for termination, asserted in *Brennan II* existed at the time the initial termination suit was filed in *Brennan I* and could have, and should have, been raised in *Brennan I*. Accordingly, the court ruled that the claims asserted in *Brennan II* are barred by *res judicata*. Brennan's appealed that judgment to the Fifth Circuit.

On June 23, 2004, while the appeal was pending in *Brennan II*, in a surprising move – and one that Respondents believe is relevant to the issue of whether *Brennan I* and *Brennan II* involve the same cause of action for *res judicata* purposes – Brennan's filed a Louisiana state court suit against its former counsel in *Brennan I*, alleging that they had committed legal malpractice by failing to seek termination of the 1998 Agreement under Article 2024.[4] In the Malpractice Action, Brennan's expressly asserted that the cause of action for termination under Article 2024 could have, and should have, been asserted in *Brennan I*, and cited counsel's failure to do so as an incident of legal malpractice. Supp. Appendix hereto, pp. 10-11, par. 28.

The Fifth Circuit ultimately affirmed the district court's ruling in a *per curiam* opinion, agreeing that the claims asserted in *Brennan II* arise from the "transaction" or "series of transactions" which were at the center of *Brennan I* – *i.e.*, the 1998 Agreement and Brennan's attempt to terminate it

---

[4] *See* the Petition filed in *Brennan's Inc. v. Edward Tuck Colbert, Kenyon & Kenyon, Leon H. Rittenberg, Jr., And Baldwin Haspel, L.L.C. f/n/a Baldwin & Haspel, L.L.C.*, No. 2005-8471 on the docket of the Civil District Court for the Parish of Orleans, State of Louisiana (hereinafter referred to as the "Malpractice Suit"), a copy of which appears in the Supplemental Appendix filed together herewith, p. 1.

under any available theory – and therefore, constitute the same cause of action for purposes of *res judicata*. The Fifth Circuit found that the claims in *Brennan II* should have been asserted in *Brennan I*, but were not, and are now barred. *See* Fifth Circuit opinion in *Brennan II*, App. to Petition, p. 1. Brennan's petitioned the Fifth Circuit for an *en banc* rehearing, which was also denied. *Id.*, 22-23. Brennan's now seeks to invoke the supervisory jurisdiction of this Court to review the Fifth Circuit's decision.

REASONS FOR DENYING THE PETITION

Nowhere in the Petition does Brennan's state which part(s) of Rule 10 of this Court's Rules supports its request that this Court exercise its supervisory jurisdiction over this matter. From the text of the Petition, however, it appears that Brennan's is relying on Rule 10(a) and (c). In addition, even though it has not identified any provision in Rule 10 that arguably supports its request, Brennan's asks this Court to overturn the Fifth Circuit's application of the "transactional" test to the facts of this case. As will be demonstrated below, however, there is no compelling reason, under any part of Rule 10, warranting the exercise of supervisory jurisdiction in this matter.

A. The Law With Regard To The Application Of *Res Judicata* Has Been Sufficiently Developed By This Court And The Fifth Circuit's Opinion Is Not In Conflict With The Jurisprudence Of This Court.

The doctrine of *res judicata* has been an accepted tenent of the law for longer than there have been courts in this country. *See Washington v. Sickles*, 65 U.S. 333, 343

(1861) ("[t]he authority of *res judicata*, with the limitations under which it is admitted, is derived by us from the Roman law and the Canonists). The doctrine is well-developed in the jurisprudence of this Court, which has characterized it as serving a 'vital public interest,' namely, that of putting an end to litigation, such that 'those who have contested an issue shall be bound by the result of the contest and that matters once tried shall be considered forever settled as between the parties.'" *Federated Department Stores*, 452 U.S. at 401. (Citations omitted). *See also Cromwell*, 94 U.S. at 352 (A final judgment "is a finality as to the claim or demand in controversy concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."); *Sunnen*, 333 U.S. at 597 (A final judgment "puts an end to the cause of action *which cannot again be brought into litigation between the parties upon any ground whatsoever*.") (Emphasis added); *Felsen*, 442 U.S. at 132 ("*Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.*") (*Citing Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 378 (1940)). (Emphasis added).

In accord with the foregoing long-standing jurisprudence of this Court, the Fifth Circuit has held that "[f]or a prior judgment to bar an action on the basis of *res judicata*, the parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final judgment on the merits and the same cause of action must be involved in both cases." *Nilsen v. City of Moss Point*, 701

F.2d 556, 559 (5th Cir. 1983). In this case, the only element that is contested is whether *Brennan I* and the instant action involve the "same cause of action."

Brennan's posits, in Sections A and C of its Petition, that this Court has not resolved the issue of the appropriate test to be applied by the federal courts in determining what constitutes the "same cause of action" for purposes of the application of the doctrine of *res judicata*, or claim preclusion, and that this important question of federal law should be settled by this Court. In fact, however, this Court has clearly indicated that the "transactional" test, as set forth in § 24 of the second *Restatement*, is the appropriate test. That section states:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a 'transaction', and what groupings constitute a 'series', are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

The ***first*** *Restatement*, which was published in 1942, recognized the "same evidence" test advocated by Brennan's in its Petition as one test that could be utilized to

assess whether the causes of action in successive law suits between parties and their privies were the same.[5] According to the Comments to § 24 of the ***second*** *Restatement*, however, as time passed and certain concepts of law and procedure – *e.g.*, the concept of a "claim," rules regarding joinder and ancillary and pendent jurisdiction – developed and evolved, that test proved too rigid and narrow. As a result, the ***second*** *Restatement*, which was promulgated in 1982, abandoned the "same evidence" test, in favor of the more pragmatic "transactional" test set forth in § 24, quoted above.[6]

---

[5] Another traditionally accepted test for determining identity of claims, the "same right, same wrong" test, was described in § 63 of the first *Restatement*. Under that test, the inquiry is whether there is but a single wrongful invasion of a single primary right of the plaintiff, though the theories of recovery might differ. *See Baltimore Steamship Company*, *supra*.

[6] The same is true of the "same right, same wrong" test. Comment (a) to § 24 in the second *Restatement* explained that:

> [I]n the days when civil procedure still bore the imprint of the forms of action and the division between law and equity, the courts were prone to associate claim with a single theory of recovery, so that, with respect to one transaction, a plaintiff might have as many claims as there were theories of the substantive law upon which he could seek relief . . . In those earlier days there was also some adherence to a view that associated claim with the assertion of a single primary right as accorded by the substantive law, so that, if it appeared that the defendant had invaded a number of primary rights conceived to be held by the plaintiff, the plaintiff had the same number of claims, even though they all sprang from a unitary occurrence . . . Still another view of claim looked to sameness of evidence; a second action was precluded where the evidence to support it was the same as that needed to support the first. . . .
>
> The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the

(Continued on following page)

This Court first recognized the "transactional" test shortly after the second *Restatement* superceded the first. In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481 n. 22 (1982), this Court stated that "[r]*es judicata* has recently been taken to bar claims arising from the ***same transaction*** even if brought under different statutes. . . ." (Emphasis added). In connection with that statement, the Court made specific reference to the draft revisions to the first *Restatement*, which promoted the adoption of the "transactional" test, but which were pending publication at the time. *Id.*

In Section C of its Petition, Brennan's relies upon *Nevada v. United States, et al.*, 463 U.S. 110 (1983), in support of its argument that this Court has not indicated that the "transactional" test is the appropriate test to be applied in this context. According to Brennan's, this Court discussed both the "transactional" test and the "same evidence" test, in *Nevada v. U.S.*, but refused to opt for one over the other. *See* Petition, p. 8. Respondents submit that Brennan's has misinterpreted the Court's pronouncement in that case.

As stated above, prior to 1982, the first *Restatement* provided that, for purposes of *res judicata*, causes of action would be deemed to be the same "if the evidence needed to sustain the second action would have sustained the first

---

number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.

action." The suit at issue in *Nevada v. U.S.* was filed in 1973, *before* the second *Restatement* came into being. The second *Restatement* abandoned the "same evidence" test, in favor of the "transactional" test quoted above, finding the latter to be "more pragmatic" as stated in the Comments to § 24.

The United States, on behalf of the Pyramid Lake Indian Reservation (the "Tribe"), plaintiff in the 1973 action, recognized that the "same evidence" test for determining whether the prior suit involved the same cause of action for purposes of *res judicata* was no longer applicable under the second *Restatement*, but argued that the Court should, nevertheless, apply the old test to determine whether the causes of action were the same, because that test was in effect at the time the 1973 action was filed. *See Nevada,* 463 U.S. at 131, n. 12. Thus, the Tribe was arguing that the "transactional" test should not be applied *retroactively*.

Although, as Brennan's correctly states, the Court did find that the result in the case would be the same under either test, it also recognized that the "same evidence" test had never, even prior to the publication of the second *Restatement* in 1982, been the *only* test by which to assess the issue of "same cause of action" for purposes of *res judicata. Id., citing The Haytian Republic,* 154 U.S. 118, 125 (1894); *Baltimore Steamship Co.*, 274 U.S. at 321. More importantly, however, the Court did not suggest that the "same evidence" test – which the American Law Institute abandoned and superceded as a stand-alone test in the second *Restatement*, advocating, instead, the "transactional" test – has any continuing validity, in modern procedural terms, as a device, in and of itself, by which to compare successive claims for purposes of *res judicata*. Nor has the

Court given any such indication since its decision in *Nevada v. U.S.*; instead, this Court has acknowledged – at least implicitly – in both *Kremer* and *Nevada v. U.S.*, that the pragmatic approach established in the second *Restatement* is best suited to the task of determining whether two cases involve the "same cause of action" for purposes of claim preclusion under the doctrine of *res judicata*.

In line with the second *Restatement* and the jurisprudence of this Court, the Fifth Circuit has also adopted the "transactional" test. *See Nilsen v. City of Moss Point*, 701 F.2d 556, 560 n. 4 (5th Cir. 1983) (*en banc*), *cert. denied*, 423 U.S. 908, *rehg. denied*, 423 U.S. 1026 (1985). As will be demonstrated below, and contrary to Brennan's assertions, so has every other federal circuit court. Because the "transactional" test, has been approved by this Court and adopted by all of the federal circuit courts of appeals, there exists no important issue of unsettled law that should be determined by this Court. Accordingly, the exercise of this Court's supervisory jurisdiction is not warranted under Rule 10(c) of the Rules of this Court.

B. There Is No Split Of Authority Between The Fifth And Second Circuits Warranting The Exercise Of This Court's Supervisory Jurisdiction.

At Section B of the Petition, Brennan's appears to argue that there is a split in the circuits, particularly, the Fifth and the Second, that needs to be resolved by this Court. According to Brennan's, the Second Circuit, employs a "same evidence" test, as opposed to a "transactional" test, to determine whether the cause of action involved in a second federal suit between the same parties (or those in privity with them) is the same as that in a

prior suit wherein a final, federal judgment was rendered, thereby putting it at odds with the Fifth Circuit.[7]

Brennan's admits, however, at page 8 of the Petition, again, citing 82 A.L.R. Fed. 829, that a majority of the circuit courts of appeals – at least seven of them, according to Brennan's – have adopted the "transactional" test, thereby implying, without ever specifically so stating, that the remaining circuit courts of appeal have adopted the "same evidence" test that Brennan's advocates in the Petition. In fact, however, Note 8 to the A.L.R. article cited by Brennan's identifies twelve circuit courts of appeals – the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, District of Columbia, and Federal Circuits – that have adopted the second *Restatement's* "transactional" test. 82 A.L.R. 829, § 2, n. 8. Although not included in the annotations to the A.L.R. article, the Third Circuit has also expressly adopted the "transactional test."[8] Thus, *all* of the federal circuit courts of appeals

[7] At page 7 of the Petition, Brennan's refers, in passing, to a test allegedly employed by the Ninth Circuit that analyzes the "essential" or "operative" facts and issues in the first and second suits to determine whether they involve the same cause of action. Brennan's admits, however, that the "essential" or "operative" facts analysis is "closely related" to the "transactional" test utilized by the Fifth Circuit, thereby implying that the two approaches would yield the same result. In fact, that is the case, since the "transactional" test employed by the Fifth Circuit examines the operative facts in order to determine sameness. It is interesting to note, however, that the article at 82 A.L.R. Fed. 829, on which Brennan's heavily relies, categorizes the Ninth Circuit as having adopted the "transactional" test set forth in the second *Restatement. See* 82 A.L.R. Fed. 829, § 2, n. 8.

[8] The Third Circuit adopted the "transactional" test in *United States v. Athalone Industries, Inc.*, 746 F.2d 977, 984 (3rd Cir. 1984) ("We are thus in keeping with 'the present trend . . . in the direction of requiring that a plaintiff present in one suit all the claims for relief that

(Continued on following page)

have adopted the "transactional" test, although, each court may consider one or more criteria in order to gauge whether two causes of action, in fact, arise out of the same transaction. Comment (b) to § 24 of the second *Restatement* approves of such an approach:

> *Transaction; application of a pragmatic standard.* The expression 'transaction or series of connected transactions,' is not capable of mathematically precise definition; it invokes a pragmatic standard to be applied with attention to the facts of the cases. . . .
>
> It should be emphasized that the concept of transaction is here used in the broad sense it has come to acquire in the interpretation of statutes and rules governing pleading and other aspects of civil procedure. . . .
>
> In general, the expression connotes a natural grouping or common nucleus of operative facts. Among the factors relevant to a determination whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether taken together, they form a convenient unit for trial purposes. Though no single factor is determinative, the relevance of trial convenience makes it appropriate to ask how far the witnesses or proofs in the second action would tend to overlap the witnesses or proofs relevant to the first. If there is a substantial overlap, the second action should ordinarily be held precluded. *But the opposite does not hold true; even when there is*

---

he may have arising out of the same transaction or occurrence.'") (Citation omitted).

> *not a substantial overlap, the second action may be precluded if it stems from the same transaction or series.*

(Emphasis added).

Although Brennan's suggests otherwise to this Court, in reality, as seen above, the "same evidence" test, as such, does not exist in the second *Restatement*, nor does the Second Circuit any longer apply the old "same evidence" test, as such. Both cases cited by Brennan's for the contrary proposition, *Tucker v. Arthur Anderson & Co.*, 646 F.2d 721 (2nd Cir. 1981) and *Ruskay v. Jensen*, 342 F. Supp. 264 (S.D.N.Y. 1972), *aff'd.*, 552 F.2d 392 (2nd Cir.), *cert. denied*, 434 U.S. 911, 98 S.Ct. 312, 54 L.Ed.2d 197 (1977), pre-date the second *Restatement*. The current "transactional" approach advocated by the second *Restatement*, and adopted by the all of the circuit courts of appeals, including the Second Circuit, allows for a consideration of evidentiary issues, but not in a vacuum, rather, in the context of the factual predicate, as a whole, in order to determine whether the claims asserted in the two actions arise out of the same transaction.

In *Woods v. Dunlop Tire Corporation*, 972 F.2d 36, 38 (2nd Cir. 1992), the Second Circuit stated that "[w]hether or not the first judgment will have preclusive effect depends in part on whether the *same transaction or connected series of transactions is at issue*, whether the same evidence is needed to support both claims and whether the facts essential to the second were present in the first." (Citation omitted). In *Pike v. Freeman*, 266 F.3d 78 (2nd Cir. 2001), the Second Circuit reiterated that "[w]hether a claim that was not raised in the previous action could have been raised therein 'depends in part on whether the same

transaction or connected series of transactions is at issue and whether the same evidence is needed to support both claims.'" (Citation omitted). The Court went on to explain its application of the test, as follows:

> To ascertain whether two actions spring from the same 'transaction' or 'claim,' we look to whether the underlying facts are 'related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties expectations or business understanding or usage.' . . . As this 'same transaction' test indicates, the 'could have been' language of the third requirement is something of a misnomer. The question is not whether the applicable procedural rules *permitted* assertion of the claim in the first proceeding; rather, the question is whether the claim was sufficiently related to the claims that were asserted in the first proceeding that it *should have been* asserted in that proceeding. . . .

Id. (Citations omitted; emphasis in original). *See also Woods v. Potter*, 63 Fed. Appx. 590, 591 (2nd Cir. 2003) (A "transactional analysis [is to be applied in determining] whether a claim is precluded from adjudication by a previous decision.") (Citation omitted).

As stated above, the Fifth Circuit adopted the transactional test enunciated in § 24 of the second *Restatement*, including Comment (b) thereto, in *Nilsen*, *supra*. 701 F.2d at 560 n. 4. The Fifth Circuit's analysis, under the "transactional" test focuses mainly on whether the two actions are based on the same nucleus of operative facts. *Agrilectric Power Partners, Ltd. v. General Electric Co.*, 20 F.3d 663, 665 (5th Cir. 1994); *In Re Southmark Corp.*, 163 F.3d

925, 934 (5th Cir. 1999). Under the Fifth Circuit's approach, "substance, not technicalities, governs the application of [the] test." *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1125 (5th Cir. 1987). (Citation omitted). (*rev'd. on other grounds*, *Thomas v. Capital Services*, 836 F.2d 866 (5th Cir. 1988)).

In its Petition, Brennan's has pointed this Court to no case which establishes an inconsistency between the Second and Fifth Circuits in their application of the "transactional test," and it is submitted that there is none – particularly, none that would have altered the result in this case. As demonstrated by its holdings in *Woods* and *Pike*, *supra*, the Second Circuit's substantive approach comports with that of the Fifth Circuit. There is no split between those circuits and no reason for this Court to exercise its supervisory jurisdiction under Rule 10(a) of the Rules of this Court.

C. The Fifth Circuit Properly Applied The "Transactional" Test In This Case.

At no point in the courts below did Brennan's suggest that, for purposes of claim preclusion under the doctrine of *res judicata*, the "same evidence" test is the appropriate test by which to determine whether the cause of action that it asserts in this case is the same as that asserted in *Brennan I*. Instead, it accepted that the "transactional" test is the proper test, but merely argued that under the "transactional" test, as it is routinely applied by the Fifth Circuit, the two causes of action were not the same. Brennan's now argues before this Court that the Fifth Circuit misapplied the "transactional" test by, according to

Brennan's, failing to distinguish between the exercise of a contractual right and a cause of action. Petition, pp. 9-11. As the Fifth Circuit held, however, this is a distinction without a difference. *See* Fifth Circuit's opinion in *Brennan II*, App. to Petition, p. 2.

Unless a contractual right is self-operative, all that it does is to give rise to a cause of action for the judicial enforcement of the right. The *only* way that Article 2024 termination can be self-operative is if the party against whom termination is sought acquiesces in the termination. Not only has Dickie not acquiesced in the attempted termination, he has disputed that the 1998 Agreement is even subject to Article 2024. In order to terminate the 1998 Agreement, therefore, Brennan's has asserted a cause of action to judicially enforce its alleged contractual right under Article 2024. A "cause of action" for purposes of claim preclusion is clearly at issue. The Fifth Circuit was correct on that point.

The Fifth Circuit also correctly determined that the 1998 Agreement is the "transaction" that is at the root of both *Brennan I* and *Brennan II*. *See id.*, at App. to Petition, pp. 1-2. Under the "transactional" test established in § 24 of the second *Restatement*, "a contract is generally considered to be a single transaction for purposes of claim preclusion." 18 James W. Moore, *Moore's Federal Practice* § 131.23, at 131-61 (3rd ed. 2004).

Brennan's objective in *Brennan I* was to secure termination of the 1998 Agreement by any means, any grounds, and under any theory, possible. It failed to achieve its goal in *Brennan I*, and, obviously, retained new counsel to find another way to skin the proverbial cat. Acting with the

benefit of fresh eyes cast on an old problem, Brennan's new counsel now has raised the instant alternative ground for termination of the 1998 Agreement, one that was obviously overlooked by Brennan's original counsel.

Here, there is but one contract and one right to seek termination, although there may exist more than one ground upon which to seek termination. In *Brennan I*, Brennan's sought termination on two separate grounds. If it had yet a third basis for seeking termination available to it at that time, it could have, and should have, asserted that cause of action in *Brennan I*, as the Fifth Circuit so held. Fifth Circuit's opinion in *Brennan II*, App. to Petition, p. 2.

Brennan's argues, however, that, at the time of *Brennan I*, it had "no reason or even ability to assert an Article 2024 cause of action for termination in the 2000 Lawsuit [which was not tried until October, 2002]." Petition, p. 10. What Brennan's fails to state, however, is that the *only* impediment to asserting its cause of action, under Article 2024 was that Brennan's either chose not to send a termination letter prior to the trial in *Brennan I*, or as is more likely, that its former counsel in *Brennan I* simply failed to think of the alternative termination grounds available at the time. Brennan's could easily have sent a termination letter prior to, or during the pendency of, *Brennan I* and could have obtained leave, under F.R.C.P. 15, to amend its Complaint to have included that additional, alternative ground for termination.

Brennan's arguments that any attempt to assert an Article 2024 cause of action in *Brennan I* would have been

premature, that the Fifth Circuit's holding implicates *future* contractual rights and obligations, and that it had "no reason or ability to assert an Article 2024 cause of action" in *Brennan I* are disingenuous. Petition, pp. 10, 11. Brennan's has represented to this Court that the right to terminate granted under Article 2024 is "inherent" in every Louisiana contract of indefinite duration. *Id.*, p. 11. Thus, the right to terminate under Article 2024, if it exists at all, existed, and was fully ripe, at the time of *Brennan I*, as a matter of state law. *Nothing* has occurred since that time to cause any such right to subsequently spring into existence, and no future contractual rights or obligations are implicated here. No impediment, legal or otherwise, prevented Brennan's from asserting a cause of action for termination under Article 2024 in *Brennan I*.

It now appears obvious, from the allegations asserted by Brennan's in the Malpractice Action, that the only reason that Brennan's did not pursue a termination cause of action under Article 2024 in the prior proceeding is because its former attorneys, allegedly, failed to advise Brennan's of the existence of the cause of action under Article 2024. *See* Malpractice Suit, Supp., App. pp. 10-11, pars. 28(f)-(h).[9] *Brennan I* was extremely hard-fought, with

[9] In conducting its *de novo* review of the granting of a motion to dismiss on grounds of *res judicata*, this Court is entitled to take judicial notice of the filing of the Malpractice Suit, pursuant to Rule 201(b)(2) of the Federal Rules of Evidence. The facts of Brennan's filing of the Malpractice Suit and the allegations contained therein cannot reasonably be disputed by Brennan's and are capable of accurate and ready determination by resort to the copy of the petition appearing at 1 of the Supplemental Appendix. "A court may . . . take judicial notice of its own records *or of those of inferior courts.*" *ITT Rayonier Inc. v. U.S.*, 651 F.2d 343, 345, n. 2 (5th Cir. 1981). (Emphasis added.) *See also Kinnett Dairies, Inc. v. J.C. Farrow*, 580 F.2d 1260, 1277, n. 3 (5th Cir. 1978).

(Continued on following page)

substantial discovery, extensive pre-trial motions and a two week jury trial. Under the circumstances, it is simply inconceivable that, had Brennan's realized that it had the Article 2024 arrow in its quiver, it would not have fired that shot in *Brennan I*.

Comment(d) to *Restatement* § 25 addresses this very situation, as follows:[10]

> *Successive actions changing the theory or ground.* Having been defeated on the merits in one action, a plaintiff sometimes attempts another action seeking the same or approximately the same relief but adducing a different substantive law premise or ground. This does not constitute the presentation of a new claim when the new premise or ground is related to the same transaction or series of transactions, and accordingly the second action should be held barred.

Illustration 7 to § 25 elucidates this principle:

> A brings an action against B for the cancellation of a contract made with B, alleging that the contract was procured by the undue influence and fraud of B. After verdict and judgment for B, A

Under Rule 201(f) of the Federal Rules of Evidence, judicial notice "may be taken at any stage of the proceeding." Goode, *Courtroom Handbook on Federal Evidence*, Comment (11), p. 216 (2005).

[10] Section 25 of the second *Restatement* states:

> The rule of § 24 applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action
>
> (1) To present evidence or grounds or theories of the case not presented in the first action, or
>
> (2) To seek remedies or forms of relief not demanded in the first action.

> brings a new action for cancellation of the contract, alleging mental incompetency of A. The prior judgment is a bar.

Applying the factual pattern of the Illustration to the situation at hand demonstrates that this case is on all fours with the Illustration. In *Brennan's I,* Brennan's brought an action against Dickie seeking recision of the 1998 Agreement based on fraud, or, alternatively, a termination of it based on breach. Judgment was entered in Dickie's favor on the claims for termination. Brennan's then brought a new action for termination of the contract based on the allegation that the contract has no term and is, therefore, terminable at will, under Article 2024. If the 1998 Agreement has no term, which is denied, it had no term at the time it was executed and at all times thereafter, including (i) at the time *Brennan I* was filed in 2000, and (ii) at the time *Brennan I* went to trial in late October 2002. Under the "transactional" test, "a mere change in legal theory does not create a new cause of action." 18 Charles A. Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure* § 4407 (2002), at 179. "[A] claim is coterminous with a transaction or series of transactions, regardless of the number of different legal theories that may arise as a result of plaintiff's alleged damages . . . ***The fact that plaintiff's counsel in the first action didn't happen to think of the theory advanced in the second action will also fail to avoid preclusion.*** " 18 *Moore's Federal Practice* § 131.21[3][a], at 131-43-33. (Emphasis added).

Thus, Brennan's was required to assert its Article 2024 cause of action to enforce its alleged right to terminate the 1998 Agreement in *Brennan I.* As the Fifth Circuit correctly

held, "[h]aving failed to raise [that] argument in the original suit . . . [Brennan's] is unable to file a new suit for ***purposes of rehashing old battles***." Fifth Circuit's opinion in *Brennan II*, App. to Petition, p. 2. (Emphasis added). The Fifth Circuit applied the transactional test in the manner contemplated in the *Restatement* and its resulting decision should not be disturbed.

D. Brennan's Has Not Demonstrated That The Result Would Have Been Different Under The "Same Evidence" Test.

Brennan's argues in Section D of the Petition that because the application of the "same evidence" test would purportedly have yielded a different result under the facts of this case, that test is the one that should have been applied by the Fifth Circuit, a matter not raised in Question 1 of the "Questions Presented" in Brennan's Petition. Petition, pp. i and 9. Obviously, as demonstrated above, under the second *Restatement*, the jurisprudence of this Court and the jurisprudence of every circuit court in this country, the "transactional" test is the proper test to apply in this situation.

Even if, however, by some reversal, it should be determined that the "same evidence" test applies, as a stand-alone method by which to compare claims for sameness, Respondents do not believe that the application of that test would have resulted in a different outcome under the facts of this case. As stated in Comment (b) to § 24 of the second *Restatement*, even the fact that there may not be a "substantial overlap" in the evidence needed to support the claims in the first and second cases does not necessarily mean that the

second claim is not precluded under *res judicata*. Even the Second Circuit, which Brennan's claims applies the "same evidence" test recognizes as much. However, in this case, there is a total overlap of the "same evidence."

In *Ruskay, supra*, the plaintiffs sought to defeat a motion for summary judgment based on *res judicata* grounds on the basis that the evidence required to prove the claim in the first suit was different than that which would support the claim in the second suit. The court rejected the plaintiffs' argument, observing that "[t]he 'same evidence' test may be useful as a positive test for determining the identity of claims, but ***it is not valid as a negative test***." 342 F.Supp. at 270-71. (Citation omitted; emphasis added). The Court went on to state that "[i]t will often be true that a decision on one theory of recovery will have no bearing on the determination of another. ***This does not mean that each theory states a distinct cause of action***." *Id.* at 271. (Citation omitted; emphasis added). *See also Engelhardt v. Bell & Howell Co.*, 327 F.2d 30, 34 (8th Cir. 1964) ("In short, 'the same evidence test,' if applied with complete literalness, is valid as a positive but not as a negative test for determining the identify of causes.") (Citation omitted).

In this case, however, the only evidence needed to determine the validity of Brennan's Article 2024 argument is the 1998 Agreement. That agreement was squarely at issue, and was introduced into evidence, in *Brennan I*. The fact that other additional evidence may have been required to prove Brennan's entitlement to termination of the 1998 Agreement under its other theories of recovery does not weigh in favor of a finding that the causes of action in *Brennan I* and *Brennan II* are not the same for purposes of

res judicata. There was a single contract at issue here and if Brennan's had prevailed on any theory asserted for its dissolution, there would have been but a single termination. Thus, under any test, the causes of action in *Brennan I* and *Brennan II* are the same for purposes of claim preclusion under the doctrine of *res judicata*.

CONCLUSION

Under the *Restatement,* the jurisprudence of this Court, and the jurisprudence of every circuit court of appeal in the country, the appropriate test to determine sameness of causes of action for purposes of *res judicata* is the Restatement's "transactional" test, not the "same evidence" test, as advocated by Brennan's in its Petition. The Fifth Circuit Court of Appeals properly applied that test to the operative facts underlying *Brennan II* and correctly concluded that, *Brennan II* involves the same cause of action as *Brennan I,* for purposes of *res judicata. Brennan II* does nothing more than advance an alternative ground or theory of recovery for termination of the 1998 Agreement, one that was available at the time *Brennan I* was litigated. That theory could have, and should have, been raised in *Brennan I*, as the district court and the Fifth Circuit have both concluded.

That being the case, Brennan's is barred by *res judicata* from raising it now. The result would be no different under the "same evidence" test advocated by Brennan's. The Fifth Circuit's decision was correct in all respects and this Court should now act to finally put an end to this repetitive, and seemingly unending, litigation by denying Brennan's Petition for Certiorari.

Accordingly, for the reasons fully stated herein, Respondents, Richard J. Brennan, Jr., Dickie Brennan & Company, Inc., Cousins Restaurants, Inc. and Seven Sixteen Iberville, L.L.C. request that this Court deny the Petition for Writ of Certiorari filed by Petitioner, Brennan's, Inc.

Respectfully submitted,

GARY J. ELKINS
YVONNE CHALKER
Counsel of Record
ELKINS, P.L.C.
210 St. Charles Avenue
Suite 4400
New Orleans, LA 70170-4400
Telephone: (504) 529-3600
Facsimile: (504) 599-8106

Attorneys for Respondents,
Richard J. Brennan, Jr.,
Dickie Brennan & Company, Inc.,
Cousins Restaurants, Inc. and
Seven Sixteen Iberville, L.L.C.

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

No. 2005-8471

DIVISION

BRENNAN'S INC.

VERSUS

EDWARD TUCK COLBERT, KENYON & KENYON, LEON H. RITTENBERG, JR., AND BALDWIN HASPEL, L.L.C., f/n/a BALDWIN & HASPEL, L.L.C.

FILED: ________________ ________________

DEPUTY CLERK

PETITION FOR DAMAGES AND DECLARATORY JUDGMENT

(Filed Jun. 23, 2005)

The petition of Brennan's Inc., a Louisiana corporation in good standing with its domicile located in the Parish of Orleans, respectfully represents:

1.

The defendants in this lawsuit are:

a. Edward Tuck Colbert (hereinafter "Colbert"), on information and belief; a resident and domiciliary of Washington, D.C.;

b. Kenyon & Kenyon, a partnership with its principal office in New York, New York;

c. Leon H. Rittenberg, Jr. (hereinafter "Rittenberg"), a resident and domiciliary of the Parish of Jefferson, State of Louisiana; and

d. Baldwin Haspel, L.L.C. f/n/a Baldwin & Haspel, L.L.C. (hereinafter "Baldwin Haspel"), a Louisiana limited liability company with its domicile and registered office located in the Parish of Orleans.

2.

At all times material and pertinent, Colbert was a partner in Kenyon & Kenyon and was engaged in the practice of law in Washington, D.C., and has provided legal services in the State of Louisiana.

3.

At no time has Colbert been duly admitted to practice law in the State of Louisiana and therefore the provisions of La. R.S. 9:5605 are inapplicable to him.

4.

The law firm of Kenyon & Kenyon holds itself out as one of the largest and most diversified law firms in this country concentrating on the practice of intellectual property. It represents that it is equipped with the most preeminent intellectual property litigation group in this country and that it has some of the nation's best litigators who possess very deep and first-chair trial experience. Kenyon & Kenyon also represents that it strives to provide the best client representation through its experience, technological expertise, anticipation of client needs, clear and open communication, and an understanding of the vital role played by a comprehensive intellectual property protection and enforcement strategy.

5.

At all times material and pertinent, Rittenberg was a shareholder/member of Baldwin Haspel and was engaged in the practice of law at Baldwin Haspel's office located in the Energy Centre in New Orleans, Louisiana.

6.

The law firm of Baldwin Haspel holds itself out as providing its clients the highest quality legal services in a cost-effective manner in every area of the firm's practice as promptly as possible, utilizing available modern technological advances while maintaining traditional personal attention to its client's needs. In line with this commitment, the firm represents that it has continually expanded its capabilities to cover all areas of law affecting its clients.

7.

Brennan's Inc. owns and operates Brennan's Restaurant which is located in the French Quarter in New Orleans.

8.

Brennan's Inc. has used the service mark BRENNAN'S in connection with restaurant services continually since at least as early as 1951, and it has been granted federal trademark registrations recognizing its exclusive right to use the mark for such services under both federal and Louisiana law.

9.

Brennan's Inc. is currently owned by Owen E. Brennan, Jr., James C. Brennan, and Theodore M. Brennan ("the brothers") who are the sons of the late Owen E. Brennan, Sr., the founder of Brennan's Restaurant.

10.

During the latter part of the 1970's, litigation ensued between various members of the Brennan's family including the brothers, their mother, and several of the brothers' aunts and uncles (including Richard Brennan, Sr.) over the use of the federally registered trademark, BRENNAN'S.

11.

That litigation came to a close in 1979 with a settlement agreement and consent judgment which defined the various family members' rights in the BRENNAN'S trademark. Among other things, the agreement (hereafter "1979 Agreement") gave the brothers and their mother through Brennan's Inc. exclusive rights to the BRENNAN'S trademark in Louisiana and all other states except Texas and Georgia where Richard Brennan, Sr. and his siblings held exclusive rights. The agreement also provided that no party would open or operate a new restaurant in Louisiana using the Brennan name but permitted the parties to "aid" their descendants' efforts to own or operate restaurants "under any name." And with respect to future disputes that might arise, the agreement stated that neither side would assert its trademark rights against the other for uses permitted by the agreement, but

it also said that it did not bar future claims that might arise out of a breach of the agreement.

12.

In the late 1990's, Richard Brennan, Sr. gave his son, Richard Brennan, Jr. ("Dickie Brennan") and another child a majority interest in the Palace Café restaurant which began to be known as Dickie Brennan's Palace Café. Around that same time. Richard Brennan, Sr.. Dickie Brennan, and others decided to open a new restaurant in New Orleans called Dickie Brennan's Steakhouse.

13.

In 1998, the brothers became aware of the construction of Dickie Brennan's Steakhouse three blocks away from Brennan's Restaurant.

14.

At that time, Colbert and his law firm, Kenyon & Kenyon, and Rittenberg and his law firm, Baldwin Haspel, were engaged to represent Brennan's Inc. and they provided advice to Brennan's Inc. as regarded the preparation of a license agreement which would authorize Dickie Brennan's limited use of the Brennan's name.

15.

Colbert and Rittenberg advised the brothers to meet with Dickie Brennan to discuss how to manage the use of the family name in connection with their respective restaurants.

16.

Following the brothers' meeting with Dickie Brennan and pursuant to their engagement, Colbert and Rittenberg and other members of their law firms prepared what was represented to be a license agreement and which was subsequently executed by Brennan's Inc. and Richard Brennan, Jr. in November of 1998. A copy of this agreement (hereafter "1998 Agreement") is annexed as Exhibit A.

17.

In 2000, Brennan's Inc. and the brothers sued Dickie Brennan. Richard Brennan. Sr., Dickie Brennan's, Inc., Seven Sixteen Iberville, L.L.C. (the limited liability company which owns and operates Dickie Brennan's Steakhouse) and Cousins Restaurants. Inc. (the corporation which owns and operates Dickie Brennan's Palace Café), because notwithstanding the 1998 Agreement, it had experienced numerous instances of confusion on the part of its customers concerning the relationship between Dickie Brennan's Steakhouse, Dickie Brennan's Palace Café, and Brennan's Restaurant at 417 Royal Street.

18.

Defendants represented Brennan's Inc. and the brothers in the aforementioned lawsuit which was filed in the United States District Court for the Eastern District of Louisiana and docketed as Case No. 00-2413.

19.

The federal district court judge made several rulings that narrowed the issues for trial of the lawsuit. Among other things, the district court judge ruled (1) Richard Brennan, Sr. had breached the 1979 Agreement by owning a minority share of Cousins Restaurants, Inc. and Seven Sixteen Iberville, L.L.C. and otherwise contributing to those businesses; (2) the 1979 Agreement barred the plaintiffs from bringing trademark-related claims against Richard Brennan, Sr. and the plaintiffs were limited to pursuing contract remedies against Richard Brennan, Sr.; (3) the 1998 Agreement barred the plaintiffs from pursuing trademark-related claims against Dickie Brennan and the plaintiffs would be limited to remedies for breach of contract unless they could show that the contract should be rescinded because of fraud or a serious breach; and (4) Cousins Restaurants, Inc. and Seven Sixteen Iberville, L.L.C. could exercise the rights given to Dickie Brennan under the 1998 Agreement and the plaintiffs could not pursue trademark related claims against those companies.

20.

In November of 2002, after a two week trial a jury returned a verdict finding that Dickie Brennan had not fraudulently induced the plaintiffs to enter into the 1998 Agreement, that Dickie Brennan had breached the 1998 Agreement with respect to Dickie Brennan's Steakhouse but not Dickie Brennan's Palace Café, that Dickie Brennan acted in good faith and that his breach was not so serious as to justify dissolving the 1998 Agreement. The jury awarded Brennan's Inc. $250,000 for Dickie Brennan's breach of the 1998 Agreement, and on December 13, 2002, the United States District Court judge entered a

judgment on the jury verdict and ordered Dickie Brennan to bring his conduct into compliance with the 1998 Agreement.

21.

Defendants appealed the judgment of the United States District Court judge to the United States Court of Appeal for the Fifth Circuit on behalf of Brennan's Inc. and the brothers raising several issues but failing to challenge the district court's instructions to the jury regarding termination of the 1998 Agreement (*viz.*, the court's instructions that the jury had discretion to decide whether to declare the contract at an end or instead to require Dickie Brennan to specifically perform the contract; and that the jury's decision on this question could consider the severity of Dickie Brennan's breach, his good or bad faith, and the relative fairness of the two methods of dealing with the breach).

22.

On June 28, 2004, the United States Court of Appeals for the Fifth Circuit rendered its decision affirming the district court's judgment in all respects except with respect to the rulings that the 1998 Agreement bars Brennan's Inc. and the brothers from pursuing trademark-related causes of action against Dickie Brennan. Cousins Restaurants, Inc. and Seven Sixteen Iberville, L.L.C. and that the 1979 Agreement bars Brennan's Inc. and the brothers from pursuing trademark-related causes of action against Richard Brennan, Sr. However, the court outlined several limitations or restrictions on Brennan's Inc.'s rights to pursue its trademark related claims.

23.

In its decision, the United Slates Court of Appeals for the Fifth Circuit noted specifically that the "1998 Agreement is best described as a consent-to-use agreement rather than a license" ~d that its "conclusions concerning the limitations on Dickie's liability for trademark infringement reflect both the peculiar nature of the 1998 Agreement and the fact that the agreement remains in force." It also noted that Brennan's Inc. did not assert on appeal the issues regarding termination of the contract.

24.

Shortly following the rendition of the judgment of the United States Court of Appeals for the Fifth Circuit, Brennan's Inc. terminated the services of defendants and engaged new counsel to represent it in matters pertaining to the ongoing problems with Dickie Brennan and his restaurants.

25.

The brothers first learned that the issues regarding termination of the contract were not asserted on appeal by defendants until after the United States Court of Appeal for the Fifth Circuit rendered its decision on June 28, 2004.

26.

On October 14, 2004, Brennan's Inc. filed a lawsuit in the United States District Court against Dickie Brennan and three of the companies in which he has an interest (*viz.*, Cousins Restaurants, Inc., Seven Sixteen Iberville,

L.L.C. and Dickie Brennan & Company seeking declaratory and injunctive relief decreeing that the 1998 Agreement was terminated and no longer effective and enjoining the defendants from violating its trademark rights.

27.

On April 11, 2005, the United States District Court judge dismissed this new lawsuit on grounds of *res judicata* finding in pertinent part that "[t]he time for Brennan's Inc. to litigate whether the 1998 Agreement was terminable at will under Article 2024 was in the prior suit in which it sought to terminate the agreement based on a breach thereof."

28.

Defendants were negligent and deviated below the standard of care in drafting the 1998 Agreement and in representing Brennan's Inc. in the federal court lawsuit in the following respects, not meant to be exclusive:

a. Failing to prepare a license agreement as opposed to a consent-to-use agreement;

b. Failure to include royalty provisions in the 1998 Agreement;

c. Failing to include a term in the 1998 Agreement;

d. Failing to include in the 1998 Agreement breach of contract provisions for the recovery of attorney's fees, costs, and specified damages;

e. Impairing or diminishing the strength of the trademark claims of Brennan's Inc. in the 1998 Agreement;

f. Failing to assert on appeal the issues regarding termination of the contract;

g. Failing to assert the claim to terminate the 1998 Agreement pursuant to Louisiana Civil Code Article 2024;

h. Failing to advise Brennan's Inc. of the potential *res judicata* or claim preclusive effect of defendants' failure to assert on appeal the issues regarding termination of the contract and failure to assert the claim to terminate the 1998 Agreement pursuant to Louisiana Civil Code Article 2024;

i. Any and all such other acts of negligence which will be shown at the time of trial hereof.

29.

As a direct and proximate consequence of the defendants' negligence and deviation below the standard of care for lawyers practicing in this community, Brennan's Inc. has and will continue to sustain monetary damage, loss and injury.

30.

Brennan's Inc. has also paid defendants Colbert and Rittenberg substantial sums of money for legal fees for the preparation of the 1998 Agreement and representation in the federal court lawsuit which defendants should he ordered to disgorge and return to plaintiff inasmuch as

there was a failure of consideration for such services and such services were provided in a negligent fashion.

31.

Furthermore, defendants Colbert and Kenyon & Kenyon seek approximately $2,000,000 of additional legal fees and costs from Brennan's Inc. for services rendered in connection with the federal court litigation.

32.

For the reasons set forth above, Brennan's Inc. is entitled to a judgment of this Court declaring that Colbert and Kenyon & Kenyon are not entitled to recover any sums from it for additional legal fees and costs for services rendered in connection with the preparation of the 1998 Agreement or the federal court litigation.

33.

Finally, in the event any of plaintiffs claims are found to be perempted under the provisions of La. R.S. 9:5605, plaintiff asserts the unconstitutionality of that statute under Louisiana Constitution Article 1, Section 22 because the statute deprives it of access to court.

34.

Plaintiffs prays for trial by jury and submits that the amount in controversy exceeds that amount required by Louisiana law for trials by jury.

WHEREFORE, Brennan's Inc. prays that each defendant be duly served and cited to appear and answer this

petition and that after the passage of all legal delays and due proceedings are had that there be judgment in favor of Brennan's Inc. and against Edward Tuck Colbert, Kenyon & Kenyon, Leon H. Rittenberg, Jr. and Baldwin Haspel, L.L.C., f/n/a Baldwin & Haspel, L.L.C. ordering them to pay Brennan's Inc. jointly, severally and *in solido* such sums as will reasonably compensate Brennan's Inc. for its damages together with interest from date of demand and all costs of these proceedings. Brennan's Inc. further prays that this Court enter judgment declaring that Edward Tuck Colbert and Kenyon & Kenyon are not entitled to recover any sums from Brennan's Inc. for additional unpaid legal fees and costs for services rendered in connection with the preparation of the 1998 Agreement or the federal court litigation. Plaintiff further prays for a trial by jury.

Respectfully submitted,

/s/ Robert Matthews
Robert H. Matthews, Bar #9055
830 Union St., 4th Flr.
New Orleans, LA 70112
(504) 523-4542

/s/ Pauline M. Warriner
Pauline M. Warriner, Bar #22673
830 Union St., 4th Flr.
New Orleans, LA 70112
(504) 523-4542

PLEASE SERVE:

✓ Edward Tuck Colbert
Through the Long Arm Statute

✓ Kenyon & Kenyon
Through the Long Arm Statute

✓ Leon H. Rittenberg, Jr.
(Personal Service Only)
1100 Poydras Street, Suite 2200
Energy Centre
New Orleans, LA 70163-2200

✓ Baldwin Haspel, L.L.C.
Through its Agents for Service of Process:
Jerome J. Reso, Jr.
1100 Poydras Street, Suite 2200
Energy Centre
New Orleans, LA 70163-2200

✓ State of Louisiana
Through the Attorney General:
Mr. Charles C. Foti, Jr.
Attorney General
1885 N. Third Street
Baton Rouge, LA 70802